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No. ____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JOHN R. SIMPLOT, J.R. SIMPLOT COMPANY, SIMPLOT INDUSTRIES, INC., P.J. TAGGARES, P.J. TAGGARES COMPANY and SIMTAG FARMS,

Petitioners,

v.

JOSEPH STROBL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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October 2, 1985

QUESTION PRESENTED

The question raised by this petition has never before been presented for review to this Court. It is, in our view, a question of substantial importance which transcends this case.

1. Is there any reason why a speculator in a commodity futures contract should recover treble damages under the federal antitrust laws based exclusively upon an alleged manipulation of the price of that commodity futures contract when: (i) manipulation of a commodities futures contract is proscribed by specific provisions of the Commodity Exchange Act; (ii) Congress three times rejected a treble damage remedy for any conduct proscribed by the Act; and (iii) in almost identical circumstances, antitrust treble damages may not be recovered for manipulation of the price of common stock.

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v.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners John R. Simplot, J.R. Simplot Company, Simplot Industries, Inc., P.J. Taggares, P.J. Taggares Company and SimTag Farms (the "Petitioners")[1] request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, dated and entered on July 5, 1985. That judgment and opinion affirmed a final judgment of the United States District Court for the Southern District of New York. Petitioners seek review

1 Pursuant to Rule 28.1 of this Court, petitioners state as follows: the J.R. Simplot Company is a privately held corporation; Simplot Industries, Inc. is a wholly owned subsidiary of the J.R. Simplot Company; SimTag Farms was a private joint venture; and the P.J. Taggares Company is a privately held corporation.

of that portion of the Second Circuit's decision declaring that conduct expressly subject to single damages under specific provisions of the CEA[2] and subject to the regulatory jurisdiction of the Commodity Futures Trading Commission (the "CFTC") can also provide a basis for treble damages under the generic provisions of the federal antitrust laws.

OPINIONS BELOW

The opinion of the court of appeals, reported at 768 F.2d 22 (2d Cir. 1985), is reprinted in the Appendix at A-1.[3] The district court issued two post-trial opinions, reported at 582 F.Supp. 770 (S.D.N.Y. 1984) and 590 F.Supp. 875 (S.D.N.Y. 1984). These opinions are reprinted in the Appendix at A-2 and A-28, respectively.

JURISDICTION

After incurring losses as a result of his speculation in Maine potato futures contracts (A-23; 582 F.Supp. at 772), respondent Joseph Strobl ("Strobl") brought this action in the United States District Court for the Southern District of New York, alleging, in relevant part, federal question jurisdiction under the CEA as well as the Sherman Act (A-65-66). The district court entered final judgment upon a verdict for Strobl awarding, in the alternative, single damages of $460,000 pursuant to Sections 9(b) and 4(a) of the CEA, 7 U.S.C. §§ 13(b) and 6(a), and treble damages of $1,386,000 pursuant to Section 1 of the Sherman Act, 15 U.S.C. § 1, and Section 4 of the Clayton Act,

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2 References in the form "CEA" refer to the Commodity Exchange Act, as amended by the Commodity Futures Trading Commission Act of 1974, Pub. L. No. 93-463, 88 Stat. 1389, *codified* at 7 U.S.C. § 1 *et seq.* Although the CEA was further amended by the Futures Trading Act of 1978, 92 Stat. 865, and by the Futures Trading Act of 1982, 96 Stat. 2294, *codified at* 7 U.S.C. § 1 *et seq.*, such post-1974 amendments to the CEA are not relevant here "because the activities at issue all occurred prior to their enactment." (A-7; 768 F.2d 26.)

3 References in the form "A" refer to pages of the Appendix to this Petition.

15 U.S.C. § 15 (A-53-55). The Court of Appeals for the Second Circuit affirmed the district court's final judgment (A-51-52).

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The pertinent statutes, Sections 9(b) and 4(a) of the CEA, 7 U.S.C. §§ 13(b) and 6(a); Section 1 of the Sherman Act, 15 U.S.C. § 1; and Section 4 of the Clayton Act (15 U.S.C. § 15), are reprinted in the Appendix at A-56, A-63, and A-64, respectively.

STATEMENT OF THE CASE

A. Introduction

This case presents this Court with its first opportunity to review the outcome of a private right of action instituted under the CEA which alleged manipulation of a commodity futures contract and which alleged further that this purported manipulation, in and of itself, also gives rise to treble damages under the federal antitrust laws.

B. The 1974 Amendments to the CEA

The 1974 Amendments to the CEA established a "comprehensive regulatory structure" to govern commodity futures markets, *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 356 (1982); created a new administrative agency—the CFTC—to enforce the CEA (7 U.S.C. § 4a); directed the CFTC to "take into consideration the public interest to be protected by the antitrust laws" in implementing its regulatory mission (7 U.S.C. § 19); and gave the CFTC an arsenal of surveillance, investigatory and other enforcement powers to protect commodity futures markets against anticompetitive behavior (7 U.S.C. §§ 13a-1, 13b, 15, 18), including the manipulation of commodity futures contracts.

To ensure that regulatory standards would be consistently applied to inherently similar industries—the commodities and securities industries—Congress said it "did not want to make the antitrust laws more restrictive in the commodities industry than they are in the securities industry." S. Rep. No. 93-1131, 93d Cong., 2d Sess. at 23 (Aug. 29, 1974), *reprinted in* 1974 U.S. Code Cong. & Ad. News 5843, 5863.

In line with this intent, Congress thrice rejected a proposed treble damage remedy for practices proscribed by specific provisions of the CEA and subject to the CFTC's regulatory jurisdiction. These proscribed practices include manipulation of commodities futures contracts on a commodities exchange. *See* 7 U.S.C. § 13. The repeated rejection of a treble damage remedy for CEA violations necessarily bars recovery of treble damages in this case especially since "the Commodity Exchange Act clearly governs the activities at issue." (A-10; 768 F.2d at 27).

C. The Trial

Plaintiff Strobl is a wealthy owner of bowling alleys in Detroit. In September and October 1975, acting on speculation that the new crop of Maine potatoes would be substandard, Strobl purchased futures contracts for the delivery of Maine potatoes in May 1976 at an average cost of approximately $18 per cwt (A-5; 768 F.2d at 24; A-35; 582 F.Supp. at 779). Strobl therefore could make money on his speculative investment only if Maine potatoes were worth more than $18 per cwt. by May 1976.

The new Maine potato crop was harvested after Strobl established his "long" position and, contrary to Strobl's guess, was not substandard (A-35; 582 F.Supp. at 779). Supply was such that Maine potatoes sold for approximately $5 per cwt. immediately after harvest and thereafter sold between $5 to $7.50 per cwt. through June 1, 1976.

Because a futures price must rise or fall to meet the actual cash price, *see, e.g., Cargill Inc. v. Hardin*, 452 F.2d 1154,

1157 (8th Cir. 1971), *cert. denied*, 406 U.S. 932 (1972); T. Hieronymus, *Economics of Futures Trading* 148, 152 (1971), the price of futures contracts in Maine potatoes inevitably declined from the $18.00 per cwt. Strobl had paid in September 1975. He ultimately liquidated his "long" futures position in late April and early May 1976 by purchasing offsetting "short" futures contracts at an average price of $9.25 (A-34; 582 F. Supp. at 779). Strobl's speculation ended in a $460,000 loss (A-35; 582 F. Supp. at 779).

Strobl later claimed the decline in the futures market was caused, not by fundamental economics, but because of a manipulation of the futures contract market (A-23; 582 F.Supp. at 772). In response to specific interrogatories, the jury found defendants manipulated the commodities futures contract in violation of the CEA, and, by reason of this conduct alone, also had violated Section 1 of the Sherman Act. Its verdict awarded Strobl $460,000 in single damages (A-35; 582 F.Supp. at 779, A-54).

Because we believe the arbitrary nature of the jury verdict is not an issue which is appropriate for consideration by this Court, we limit this petition to the question of whether Strobl's single damages should be subject to trebling by application of the Sherman Act to conduct which Congress, when it amended the CEA in 1974, specifically determined should be subject only to single damages.

REASONS FOR GRANTING THE WRIT

This is the first time a court of appeals has ever condoned an award of antitrust treble damages based upon conduct specifically proscribed by comprehensive and specific regulatory legislation which limits recovery to single damages.

This decision by the Second Circuit is in direct conflict with a district court decision in the Seventh Circuit.[4] This Court should grant certiorari to resolve this incipient conflict regarding an important and significant issue. *See Shapiro v. United*

4 *Smith v. Groover*, 468 F.Supp. 105 (N.D. Ill. 1979).

States, 335 U.S. 1, 4, 78 (1948) (Certiorari granted to review conflict between the Second Circuit and a district court with respect to the interpretation of the Emergency Price Control Act).

The Second Circuit's decision also is in direct conflict with federal decisions which hold uniformly that antitrust treble damages may *not* be awarded for securities price manipulation on stock exchanges. Because trading of commodities futures contracts on commodities exchanges is a near replication of trading securities on securities exchanges, and is subject to a federal regulatory scheme which is modeled upon and therefore also replicates the federal securities regulatory scheme, the Second Circuit's decision creates a disparity in punishment and expectation of persons engaged in essentially identical investment activity.

The Second Circuit's decision also announces a new standard for judging the applicability of the antitrust laws to conduct which is the specific subject of prohibitions and regulations under the regime of a federal agency, here, the CFTC. Relying upon its analysis of this Court's decisions in *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963), and *Gordon v. New York Stock Exchange*, 422 U.S. 659 (1975), the Second Circuit held that federal antitrust law was applicable in private actions involving federally regulated activity so long as application of the antitrust laws would not punish conduct "that a regulatory scheme might allow." (A-10; 768 F.2d at 27). If approved, this standard would apply, not only to private actions involving conduct subject to the regulatory jurisdiction of the CFTC, but to all private actions involving conduct subject to the regulatory jurisdiction of any federal regulatory agency, such as the SEC, the FCC, or the FPC.

We believe the Second Circuit was wrong in condoning the award of treble damages in this case, which did not involve that kind of anticompetitive activity to which the antitrust laws commonly are thought applicable. There was no claim or evidence that the price of any physical commodity was fixed or manipulated. The complaint had to do only with activity in connection with commodity futures contracts traded on a regulated commodities exchange (A-65).

Review by this Court should be seriously considered and, we believe, certiorari should be granted to determine the following questions, each of which implicates considerations which transcend this case.

1. Should treble damages be allowed where Congress has expressly stated that single damages is the appropriate remedy for the conduct in question? The Second Circuit now has said yes. A district court in the Seventh Circuit has said no on essentially identical facts, and federal courts uniformly have said no where the alleged manipulation was of securities on a securities exchange.

2. Was the Second Circuit correct in summarily rejecting the contrary reasoning of two decisions within the Seventh Circuit[5] on the specific issue of treble damage recovery where a statutory conflict on remedy exists, and on the appropriate approach to statutory construction and application in that context? A genuine disagreement exists between the two circuits which should be resolved.

3. Is it appropriate as a matter of policy to treat those who trade in commodity futures contracts on regulated commodities exchanges differently than those who trade securities on federally regulated stock exchanges? Again, the Second Circuit now has said yes. A district court in the Seventh Circuit has said no. In reaching that decision, that court relied in substantial part upon those analogous cases in which federal courts uniformly have held that a single damage remedy is the only available remedy for those who trade in securities.

4. Was the Second Circuit correct in its analysis of this Court's decisions in *Silver v. New York Stock Exchange, supra*, and *Gordon v. New York Stock Exchange, supra*, with its resulting pronouncement of a new standard controlling the applicability of federal antitrust laws to conduct which is specifically proscribed as part of a comprehensive regulatory scheme designed to police a particular industry?

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5 *Schaefer v. First National Bank of Lincolnwood*, 509 F.2d 1287 (7th Cir. 1975), *cert. denied*, 425 U.S. 943 (1976) and *Smith v. Groover*, 468 F.Supp. 105 (N.D. Ill. 1979).

POINT I

CERTIORARI SHOULD BE GRANTED BECAUSE THE SECOND CIRCUIT'S DECISION CONFLICTS WITH OBVIOUS CONGRESSIONAL INTENT

The Second Circuit failed to deal in substantive fashion with the import of Congress' explicit and repeated rejection of three bills providing for a treble damage remedy for conduct which violates the CEA. It concluded summarily and without basis that the defeat of these bills "says nothing about its [Congress'] view with respect to antitrust violations" and that "[t]he most that can safely be implied from the rejection of these bills is that it was not Congress's purpose either to expand or contract treble damage remedies." (A-12; 768 F.2d at 28). No justification exists for this conclusion, particularly when the comprehensive character of the CEA's remedial scheme, coupled with the CFTC's impressive array of enforcement tools, "strongly evidences an intent not to authorize additional remedies." *See Northwest Airlines, Inc. v. Transport Workers Union of America, AFL-CIO*, 451 U.S. 77, 93-94 (1981). If anything, the defeat of the three bills proposing a treble damage remedy conclusively demonstrates that Congress meant to preclude treble damage recovery for conduct proscribed by specific provisions of the CEA.[6]

The CEA, as amended in 1974, constitutes "a comprehensive regulatory structure to oversee the volatile and esoteric futures trading complex." *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 356 (1982). Numerous provisions pro-

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6 Ignoring the full Congress' rejection of a treble damage remedy, the Second Circuit relied essentially upon a single letter addressed to the Senate Agriculture and Forestry Committee by Representative Peter W. Rodino Jr. (A-13; 768 F.2d 28-29). Read in the context of the entire Congressional debate, Representative Rodino's letter is at best ambiguous and evidences no more than support for Congress' quite specific direction that the CFTC exercise its regulatory powers as consistently as possible with federal antitrust goals. *See* 7 U.S.C. § 19.

vide for penalties and reparations for CEA violations. *See, e.g.*, 7 U.S.C. §§ 13, 13-1, 13a-1, 13b, 18. Congress provided for a single damage remedy only.[7] This Court has provided for a private right of action on this basis. And the CEA does not provide for and has not been interpreted to include any additional remedies of any sort for a private litigant.

In these circumstances, this Court has not favored the imposition of remedies additional to those expressed or implied in a specific and comprehensive regulatory scheme. In *Northwest Airlines, Inc. v. Transport Workers Union of America, AFL-CIO,* 451 U.S. 77, 95, 97 (1981), this Court held that an employer, found liable to its employees under the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964, had no federal common law right of contribution against the employees' union, even on the express assumption that elements of common contribution were satisfied. The touchstone of the decision was this Court's declaration: "The judiciary may not, in the face of such comprehensive legislative schemes, fashion new remedies that might upset carefully considered legislative programs." *Id.* at 97.

We do not claim *Northwest* necessarily is controlling in this case, because the creation of a federal claim for contribution obviously differs from a claim for treble damages under another federal statute, here, the Sherman Act. But, even if not dispositive, *Northwest* surely is relevant when application of the Sherman Act to the facts of this case introduces remedial inconsistencies, which include not only triple recovery but the recovery of attorneys' fees, and introduces a different statute of limitations as well. We believe the Second Circuit's decision is at odds with the reasoning of *Northwest*, and should be reviewed by this Court for this reason also.

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7 *Compare* H.R. 11195, 93d Cong., 1st Sess. Section 17(3) (1973); S.2837, 93d Cong., 1st Sess. Section 505 (1973), p. 119; and S.2578, 93d Cong., 1st Sess. Section 20(3) (1973), pp. 76-77, with Pub.L.No. 93-463, 88 Stat. 1389, *codified at* 7 U.S.C. § 1 *et seq.*

POINT II

CERTIORARI SHOULD BE GRANTED BECAUSE A CONFLICT EXISTS BETWEEN THE SECOND AND SEVENTH CIRCUITS BOTH ON THE SPECIFIC ISSUE OF TREBLE DAMAGE RECOVERY AND ON THE APPROPRIATE APPROACH TO STATUTORY CONSTRUCTION AND APPLICATION

In *Smith v. Groover*, 468 F.Supp. 105 (N.D. Ill. 1979), as the Second Circuit acknowledged, the district court "faced a situation in all important respects identical to the one here." (A-14; 768 F.2d at 14). Plaintiffs claimed certain soybean traders and brokers had jointly manipulated the price of soybean futures by executing "orders without trading in the pits by open outcry, a practice known in the trade as 'bucketing'." 468 F.Supp. at 107. Plaintiffs sought to recover under both the CEA and the Sherman Act.

The court in *Smith* acknowledges that the drafters of the 1974 Amendments to the CEA intended to preserve the applicability of the antitrust law with respect to conduct which was *not* proscribed by the CEA, *see Silver v. New York Stock Exchange*, 373 U.S. 341 (1963), but found the real question was whether plaintiffs might simultaneously pursue both single and treble damages for conduct which was proscribed by the CEA. *Smith v. Groover*, 468 F.Supp. 105, 116-17 (N.D. Ill. 1979).[8] The *Smith* court answered in the negative. "The spe-

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8 The court of appeals purports to attack the holding in *Smith* on the ground that the authorization of alternative pleading by Rules 8(a)(3) and 8(e)(2) of the Rules of Federal Practice provide that inconsistent causes of action may be stated alternatively and hypothetically and therefore Strobl was not required to make an election of remedies. The reliance upon those rules is misplaced. Limiting recovery for an alleged CEA violation to the single damage remedy contained in that Act would not revive the ancient practice of requiring an election between two inconsistent remedies (a practice which Rules 8(a)(3) and 8(e)(2) were designed to overcome), but rather would recognize that no treble damage remedy, under any rubric, exists for activity specifically covered by the CEA.

cific statutory prohibitions contained in the CEA . . . must prevail over the general prohibitions of the Sherman Act." 468 F.Supp at 116. Its holding turned in part upon the marked inconsistency between the single damage remedy provided in the CEA and the treble damage remedy provided in the Sherman Act:

> Under the CEA, plaintiffs may recover only single damages; the Sherman Act provides for recovery of treble damages . . . Given [this] apparent inconsistenc[y], plaintiffs must pursue their more specialized remedy.

468 F.Supp. at 116.

The court in *Smith* quite logically concluded that Congressional rejection of three bills providing for treble damages for CEA violations "demonstrates . . . a congressional decision not to expand recovery under the existing private right." 468 F.Supp. at 113.[9]

In reaching its decision, the court in *Smith* also relied heavily upon the Seventh Circuit's determination of the identical issue in a case involving the closely analogous offense of securities manipulation. *Schaefer v. First National Bank of Lincolnwood*, 326 F.Supp. 1186 (N.D. Ill. 1970), *aff'd in part and rev'd in part*, 509 F.2d 1287 (7th Cir. 1975), *cert. denied*, 425 U.S. 943 (1976). Plaintiffs in *Schaefer* brought an action based upon common law fraud, the Sherman Act, the Clayton Act, the Securities Act of 1933 and the Securities Exchange Act of 1934. The antitrust claims were made in connection with an alleged manipulation of the market price of a publicly traded

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9 Similarly, in *Navigator Group Funds v. Shearson Hayden Stone, Inc.*, 487 F.Supp. 416 (S.D.N.Y. 1980), the court, in upholding a private right of action under the CEA rejected the argument that the repeated Congressional refusal to sanction treble damages for CEA violations reflected an intent that no private right of action should exist at all. The court construed the Congressional rejection of a treble damage remedy as evidencing, in the exact language of *Smith*, "nothing more than a congressional decision not to expand recovery under the existing private right." 487 F.Supp. at 423.

security and were predicated upon the theory that "the conspiracy to create and maintain an artificial trading price for . . . stock . . . was price fixing . . . [within the literal language] of the Sherman Act." *Schaefer v. First National Bank of Lincolnwood*, 509 F.2d 1287, 1299 (7th Cir. 1975), *cert. denied*, 425 U.S. 943 (1976).

In concluding that the antitrust claims were not permissible in these circumstances, the Seventh Circuit expressly adopted the reasoning of the district court in *Schaefer* (509 F.2d at 1300) which dismissed the antitrust claims because: (i) the Securities Exchange Act's specific prohibition against securities price manipulation preempted the more generalized Sherman Act claim with respect to conduct which was arguably actionable under both statutes (326 F.Supp. at 1190-91); (ii) the alleged market manipulation scheme constituted fraud and not a restraint of trade as contemplated by the Sherman Act (326 F.Supp. at 1191-92); and (iii) inconsistencies between the Sherman Act and the Securities Exchange Act with respect to statutes of limitation, provisions for attorneys' fees and *recoverable damages* conclusively established that Congress could not have intended securities fraud claims to be tried as a matter of restraint of trade. (*Id.* at 1192). Indeed, the district court in *Schaefer*, with the subsequent approval of the Seventh Circuit (509 F.2d 1300), found this inconsistency of remedies sufficient in itself to require dismissal of the antitrust claims.

> Certainly Congress could not have intended that the damage restrictions contained in the carefully drawn prohibitions against market manipulation in the 1934 Act could be evaded and effectively nullified by the simple expedient of invoking the Sherman Act. (326 F.Supp. at 1192).

The Second Circuit rejected these relevant and reasoned decisions with the back of its judicial hand. It first noted "that, unlike the securities and antitrust laws, the commodities and antitrust laws have long co-existed." (A-16; 768 F.2d at 30). It next characterized the district court's opinion in the *Smith* case

as "untenable." (A-16; 768 F.2d at 30). The decision in *Smith* cannot be characterized as "untenable" and the Second Circuit is wrong in its statement that "unlike the securities and antitrust laws, the commodities and antitrust laws have long co-existed."

Because the Second Circuit offers no support for this last conclusion, it apparently was relying upon four cases cited earlier in its opinion (A-12; 768 F.2d at 28): *Chicago Board of Trade v. Olsen*, 262 U.S. 1 (1923); *Chicago Board of Trade v. United States*, 246 U.S. 231 (1918); *United States v. Patten*, 226 U.S. 525 (1913); *Miller v. New York Produce Exchange*, 550 F.2d 762 (2d Cir.), *cert. denied*, 434 U.S. 823 (1977). If this is the case, however, the Second Circuit's reliance is misplaced.

Not one of these four cases had to do with purported manipulation of the price of futures contracts on a commodities exchange. *Chicago Board of Trade v. Olsen* held only that futures markets affect interstate commerce as a part of its rejection of a challenge to constitutionality of the Grain Futures Act. *Chicago Board of Trade v. United States* decided whether certain CBOT rules comported with strictures of the Sherman Act. *Patten* was concerned only with the applicability of federal antitrust laws to a corner of the physical supply of cotton. The question in *Patten* was "whether a conspiracy to run a corner in the available supply of a staple commodity, such as cotton. . . is within the terms of § 1 of the Anti-trust Act." *Id.* at 540-41. The *Miller* case never considered, much less determined, whether an antitrust claim might be brought based upon concerted action in violation of various provisions of the CEA.

The Second Circuit also rejected the rational and federally consistent manner in which the Seventh Circuit in *Schaefer*, and the district court in *Smith*, approached the difficult problems of statutory construction and application which are inherent whenever two statutes, one specific and one general, may be said to prohibit identical conduct.

It is a fundamental canon of statutory construction that "[s]pecific terms prevail over the general in the same or

another statute which might otherwise be controlling." *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 228-29 (1957), *quoting with approval, Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208 (1932) (citation omitted).

Consistent with this fundamental principle, both *Smith* and *Schaefer* followed those numerous federal courts which, when faced with a specific statutory single damage claim and a treble damage antitrust claim based upon the same conduct, held the only permissible claim was for the specific single damage remedy. *See, e.g., Terminal Warehouse Co. v. Penn. R. Co.*, 297 U.S. 500 (1936) (Cardozo, J.) (Plaintiff had no antitrust action against either a competitor or a railroad which granted rate preferences to the competitor, but was limited to the specific remedy provided under the Interstate Commerce Act); *Bucher v. Shumway*, 452 F.Supp. 1288 (S.D.N.Y. 1978) (Fixing the price of a particular securities purchase was not cognizable under the antitrust laws); and *In re Transocean Tender Offer Securities Litigation*, 427 F.Supp. 1208 (N.D. Ill. 1977) (Plaintiffs' claims for alleged market manipulation or coercion must be pursued under the securities laws; their antitrust claims were superfluous at best).

Again, the Second Circuit disagreed summarily. It simply stated: "we do not believe that the specific remedy rule—a rule of statutory construction—should be applied in this case." (A-16; 768 F.2d at 30). No substantive explanation was provided.

This Court should grant certiorari to resolve the incipient conflict between the Second Circuit's decision and *Smith v. Groover, supra*. The Second Circuit's decision provided no cogent reason to disregard the holding and reasoning of *Smith v. Groover, supra*, and of a closely related case, *Schaefer v. First National Bank of Lincolnwood, supra*. Moreover, this Court should grant certiorari because the Second Circuit expressly rejected a fundamental rule of statutory construction, namely the specific remedy rule, which has been repeatedly enunciated by this Court. *See supra* at p. 14.

POINT III

CERTIORARI SHOULD BE GRANTED BECAUSE THE SECOND CIRCUIT'S DECISION INTRODUCES DISPARITY IN THE APPLICATION OF FEDERAL LAWS TO ESSENTIALLY IDENTICAL INVESTMENT ACTIVITY

The Second Circuit's decision raises the basic question of whether investors in commodities futures contracts ought to be subject to different standards than investors in common stock.[10] The Second Circuit has now said yes. That determination merits review by this Court.

There is no reason why the federal antitrust laws should apply in one case while not in the other. This is particularly true in view of: (i) Congress' admonition that it did not want to make the antitrust laws more restrictive in the commodities industry than in the securities industry, *see* S. Rep. No. 93-1131, 93d Cong., 2d Sess. at 23 (Aug. 29, 1974), *reprinted in* 1974 U.S. Code Cong. & Ad. News 5843, 5863, and (ii) the impropriety of imposing inconsistent remedial standards upon inherently similar industries. *See Leist v. Simplot*, 638 F.2d 283, 298 n.14 (2d Cir. 1980), *aff'd sub nom. Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353 (1982) ("While there are differences between the commodities and securities fields, what is relevant to the present question is the common legislative objective of insuring fair dealing for investors on what are important public markets, and the common legislative approach to attaining this objective. The analogy between the two fields has been repeatedly recognized by Congress . . . by the courts . . . by the CFTC . . . and by the commentators . . . ").

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10 Federal courts have uniformly rejected treble damage recovery for manipulation of common stock. *Schaefer v. First National Bank of Lincolnwood*, 509 F.2d 1287 (7th Cir. 1975), *cert. denied*, 425 U.S. 943 (1976); *Kalmanovitz v. G. Heileman Brewing Co., Inc.*, 576 F.Supp. 922, 928 (D. Del. 1983); *Bucher v. Shumway*, 452 F.Supp. 1288, 1290 (S.D.N.Y. 1978).

POINT IV

CERTIORARI SHOULD BE GRANTED BECAUSE THE SECOND CIRCUIT HAS ANNOUNCED A STANDARD FOR TREBLE DAMAGE RECOVERY IN A FEDERALLY REGULATED AREA WHICH HAS CONSEQUENCES REACHING FAR BEYOND THIS CASE

The Second Circuit's decision established a standard for determining the applicability of the antitrust laws to conduct subject to the plenary regulatory jurisdiction of the CFTC. The Second Circuit, relying upon its interpretation of two decisions of this Court, *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963), and *Gordon v. New York Stock Exchange*, 422 U.S. 659 (1975), held that private treble damage actions must be allowed unless such actions seek to punish conduct "that a regulatory scheme might allow." (A-10; 768 F.2d at 27).

The standard enunciated by the Second Circuit has far-reaching consequences. In the instant case, application of the standard creates stark conflicts and inconsistencies regarding the amount of recoverable damages, the award of attorneys' fees, and the applicable statute of limitations. *See supra* at pp. 11, 12. More importantly, the standard articulated by the Second Circuit cannot be confined to cases involving the interaction between the antitrust laws and the CEA but extends to any case where a federal regulatory agency has jurisdiction over conduct which may give rise to an antitrust violation. Petitioners do not know, nor could they know, all the conceivable and potentially ominous consequences which would ensue. This Court, not a lower court interpreting precedents of this Court, should be the final arbiter of the meaning of *Silver v. New York Stock Exchange, supra*, and *Gordon v. New York Stock Exchange, supra*, and should be the Court to formulate standards with such far-reaching consequences.

CONCLUSION

Certiorari should be granted.

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Respectfully submitted,

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